

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

2000 Biennial Regulatory Review)
Separate Affiliate Requirements of Section)
64.1903 of the Commission's Rules)

CC Docket No. 00-175

**COMMENTS OF THE
ASSOCIATION OF COMMUNICATIONS ENTERPRISES**

The Association of Communications Enterprises (“ASCENT”),¹ through undersigned counsel, and pursuant to Section 1.415 of the Commission’s Rules,² hereby offers the following comments on the *Notice of Proposed Rulemaking* (“NPRM”) released in the captioned proceeding on September 14, 2001. The Commission seeks comment on “whether or not the benefits of the separate affiliate requirement for facilities-based providers continue to outweigh the costs and whether or not there are alternative safeguards that are as effective but impose fewer regulatory costs.”³ ASCENT believes the separate affiliate requirement remains necessary to the promotion of competition and should thus be retained without modification. There are, unfortunately, no alternative safeguards which would be as effective a protection

¹ ASCENT is a national trade association representing smaller providers of competitive telecommunications and information services. ASCENT was created, and carries a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of telecommunications and information services. ASCENT is the largest association of competitive carriers in the United States, numbering among its members not only the large majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers, as well.

² 47 C.F.R. § 1.415.

³ NPRM, FCC 01-261 at ¶ 1.

against anticompetitive behavior in this regard. To the extent the separate affiliate requirement would pose a significant economic hardship on a particular independent incumbent local exchange carrier (“LEC”), the appropriate means of providing relief would be, as Staff has suggested, the entertainment of limited waiver requests on a case-by-case basis, not wholesale evisceration of the existing rule.

As the *NPRM* notes, the Commission’s rules currently “require that incumbent independent LECs use a separate corporate affiliate if they wish to provide in-region, interstate, interexchange service or in-region international interexchange service (in-region, interexchange service), in whole or in part, on a facilities basis.”⁴ As a result of its determination that “incumbent independent LECs providing in-region, interexchange service exclusively through resale were less likely to be able to engage in anti-competitive behavior than similar LECs providing in-region, interexchange service using facilities that they owned,”⁵ the Commission has relaxed the separate affiliate obligation, requiring under that circumstance the use of “a separate corporate division subject to certain safeguards.”⁶ Notwithstanding this relaxation, however, the Commission has made clear its understanding that even “incumbent independent LECs reselling in-region, interexchange services still possess[] some ability to engage in anti-competitive behavior.”⁷

⁴ Id.

⁵ Id. at ¶ 5.

⁶ Id.

⁷ Id.

The separate affiliate requirement for incumbent independent local exchange carriers that provide in-region, interstate domestic interexchange services or in-region international interexchange services embodied in Part 64, Subpart T of the Commission's Rules, "generally requires that the separate affiliate: (1) maintain separate books of account; (2) not own transmission or switching facilities jointly with its affiliated exchange company; (3) take, pursuant to tariff, any services for which its affiliated exchange carrier is required to file a tariff; and (4) be a separate legal entity from the affiliated exchange company."⁸ As the Updated Staff Report notes, the purpose of this separate affiliate requirement is to "prevent incumbent independent LECs from exercising market power in the provision of in-region long distance services."⁹

⁸ Federal Communications Commission, Biennial Regulatory Review 2000, Updated State Report ("Updated Staff Report"), January 17, 2000, p. 150.

⁹ Id.

Pursuant to the directives of Sections 11(a)(1), 11(a)(2) and 202(h), the Commission is required “to review certain of its rules biennially and determine whether those rules are no longer necessary in the public interest *as a result of meaningful economic competition*.”¹⁰ In addressing the status of competition, the Updated Staff Report noted that “[c]ompetition in the local exchange and exchange access markets is growing, although competitive local exchange carriers still serve only a small percentage of local exchange lines,” with service to residential consumers in the rural areas frequently served by independent incumbent LECs lagging far behind competitive initiatives in other areas.¹¹ Notwithstanding the Commission’s finding of a very limited amount of competition in the local exchange and exchange access markets, “a number of parties argued that the separate subsidiary requirement should be eliminated immediately for small and mid-size carriers.”¹² ASCENT believes the alternative view, “that the separate subsidiary requirement is necessary to prevent independent incumbent LECs from leveraging their local exchange market power into the long distance market,”¹³ is the more logical holding and militates against further relaxation of the separate affiliate requirement.

Inasmuch as the presence of meaningful competition is a prerequisite to Commission action pursuant to Sections 11(a)(1), 11(a)(2) and 202(h), it is clear that in the face of only limited local exchange and exchange access competition, outright relief from the separate

¹⁰ 2000 Biennial Regulatory Review (Report), FCC 00-456, CC Docket No. 00-175 (rel. Jan. 17, 2001), ¶ 12 (emphasis added).

¹¹ Updated Staff Report at p. 150.

¹² Id. at p. 151.

¹³ Id.

affiliate obligation would be inappropriate. The state of local exchange and exchange access competition has not noticeably increased in the nine months following issuance of the Report; nor has it appreciably increased from levels existing at the time of the issuance of the Updated Staff Report. Indeed, as WorldCom has noted in opposing the elimination of the separate affiliate requirement, “the Staff Report indicates, ILECs retain overwhelming market power in local markets, without regard to whether the ILEC is a Regional Bell Holding Company or an Independent LEC.”¹⁴ Accordingly, the policy rationale which lead to the adoption of the separate affiliate requirement holds as true today as when it was established and should neither be eliminated nor relaxed.

¹⁴ Comments of WorldCom, Inc., on Biennial Regulatory Review 2000 Staff Report (October 10, 2000), p. 5.

Even as it has held that “independent LECs should be classified as nondominant because they do not have the ability to profitably raise and sustain prices of in-region, interstate, domestic interexchange services by restricting output,” the Commission has nonetheless required “that such LECs should be required to provide these services subject to the *Competitive Carrier Fifth Report and Order* separation requirements in order to prevent and detect cost misallocation, access discrimination, and price squeeze.”¹⁵ In so doing, the Commission specifically rejected arguments “that rural and mid-sized independent LECs have less incentive and ability than larger LECs to engage in cost misallocation, unlawful discrimination, or a price squeeze against rival interexchange carriers”¹⁶ noting that “the size of a LEC will not affect its incentives to improperly allocate costs between its monopoly services and its competitive services.”¹⁷

¹⁵ Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace; Leaco Rural Telephone Cooperative, Inc. Petition for Waiver (Second Order on Reconsideration and Memorandum Opinion and Order), 14 FCC Rcd. 10771 (1999), ¶ 8 (“Second Order on Reconsideration”).

¹⁶ Id. at ¶ 17.

¹⁷ Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace (Second Report in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61), 12 FCC Rcd. 15756 (1997), ¶ 180.

Indeed, the Commission concluded “we should not exempt any independent LECs from the *Fifth Report and Order* requirements based on their size or rural service territory because neither a carrier’s size nor the geographic characteristics of its service area will affect its incentives or ability to improperly allocate costs or discriminate against rival interexchange carriers.”¹⁸ “Although suggested by several commenters, a rule that exempted all LECs with less than 2 percent of the nation’s access lines would essentially eviscerate our regulation of independent LECs because it would exempt all 1100 independent LECs except the GTE companies (approximately 12 percent) and the Sprint/United companies (approximately 4 percent).”¹⁹

The Commission remained unpersuaded, in June of 1999, “that the potential for competition in the local exchange market has reduced the actual ability of small LECs to leverage their monopoly power in an anticompetitive manner.”²⁰ The Updated Staff Report and the Report do not observe a noticeable change in those markets which would support a contrary conclusion. As the *NPRM* notes, “[t]he Commission specifically based the separate affiliate requirement adopted in the *LEC Classification Order* on the conclusion that the incumbent LECs’ control of local exchange and exchange access facilities gave them the ability and incentive to engage in” the above described anticompetitive behavior. Certainly independent incumbent LECs retain bottleneck control of facilities, and while that is the case, the separate affiliate requirement will retain its vitality.

¹⁸ Id. at ¶ 183.

¹⁹ Id. at n. 517.

²⁰ Second Order on Reconsideration, 14 FCC Rcd. 10771 at ¶ 17.

Consistent with the foregoing, ASCENT urges the Commission to refrain from modifying separate affiliate requirement of § 64.1903 of the Commission's Rules. The policy rationale supporting that requirement continues to retain its full vitality and any relaxation of the requirement would be inappropriate as premature. To the extent that the existing rules would work a true economic hardship on individual independent incumbent LECs, rather than modifying the existing rule, the Commission should adopt the Staff's recommendation that it undertake on a case-by-case basis requests for "limited waivers of the separate subsidiary requirements in circumstances where the prohibition on joint ownership creates hardship for an ILEC's equipment choices."²¹

Respectfully submitted,

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²¹ Report, FCC 00-456 at ¶ 64.